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IN THE

Supreme Court of the United States

October Term, 1957

No. 1095

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. ——

KAMEN SOAP PRODUCTS COMPANY, INC., *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner, Kamen Soap Products Company, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Claims dismissing its petition in the nature of an independent bill of review to set aside a prior judgment of the Court of Claims obtained on false testimony.

OPINIONS BELOW

There is attached hereto as Appendix A the order of the Court of Claims entered December 4, 1957, dismissing the petition of Kamen Soap Products Company, Inc., and also the Court of Claims order entered March 5, 1958, denying petitioner's timely motion for rehearing. Neither of said orders is reported.

In addition there is attached hereto as Appendix B the decision of the Court of Claims in the case of *Kamen Soap Products Company, Inc.* vs. *United States,* reported at 129 Ct. Cl. 619, 124 F. Supp. 608, with respect to which relief was sought below in the independent action which gives to this petition.

JURISDICTION

The judgment of the Court of Claims was entered December 4, 1957, and a timely petition for rehearing was denied March 5, 1958 (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C., 1255.

QUESTIONS PRESENTED

1. Do the provisions of Rule 54 (b) of the Court of Claims Rules (which is substantially identical to Rule 60 (b), F.R.C.P.) permit both a motion and a separate proceeding to be maintained seeking relief from a final judgment, order or proceeding obtained by admittedly false testimony discovered after the trial?

2. Does a litigant have the right to maintain an independent action for relief against a final judgment, order or proceeding, obtained by admittedly false testimony discovered after the trial, even though he has been denied such relief on motion made in the original proceeding?

3. Are the remedies of post-judgment motion and independent action, as authorized in Rule 54 (b) of the Court of Claims and Rule 60 (b), F.R.C.P., for relief against a final judgment, order or proceeding, obtained by false testimony, mutually exclusive or may both remedies be pursued by an aggrieved litigant?

RULE INVOLVED

Rule 54 (b) of the Court of Claims Rules, which is substantially identical to Rule 60, F.R.C.P. provides:

> "Mistakes, Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.: On motion and

upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 53 (c); (3) fraud (whether heretofore denominated intrinsic or extrinsic) misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of the Court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the Court. . . . "

STATEMENT OF THE CASE

Petitioner brought an independent action in the Court of Claims under Rule 54 (b) of the Court of Claims which is substantially identical to Rule 60 (b), F. R. C. P., to obtain relief from a prior judgment of that court. By that prior judgment, the Court of Claims dismissed petitioner's cause of action on the basis of a finding of fraud in the presentation and prosecution of said action. 129 Ct. Cl. 219, 124 F. Supp. 608 (1954).

Originally, proceedings were instituted by petitioner in the Court of Claims to recover upon a contract with the United States pertaining to the manufacture and sale to the Army Quartermaster Corps of certain soap and tallow products. In opposition the United States

interposed a plea of fraud in the prosecution of said claim. The Court of Claims ultimately found in favor of the Government on that issue and entered a finding of fraud and a judgment of forfeiture.

Subsequent to that judgment, petitioner's President was indicted and tried in the United States District Court for the District of Columbia for allegedly attempting to defraud the Government. To establish that fraud had been perpetrated, the prosecution relied upon the same three witnesses who had testified in the Court of Claims, and upon whose testimony that Court entered the finding of fraud. It developed, however, upon cross-examination of these witnesses that the documents they used as the basis for their testimony were spurious, and that, except for the use of these spurious documents to refresh their recollections, they had no independent knowledge of the matters about which they testified.

Specifically, the issue was whether petitioner had submitted a covering letter with its bid on the Army's order. That issue was the keystone as to whether petitioner's chief officer, upon whom establishment of the claim depended, was or was not credible. The three witnesses, all employees or members of the Quartermaster Corps, produced at the Court of Claims trial what purported to be an abstract of all the bids received, and what purported to have been prepared under the direction of one or more of said witnesses and what purported to bear one or more of their signatures. Based upon this purported abstract of the bids, these witnesses, upon the basis of past recollection recorded, testified that no letter had accompanied petitioner's bid, and the Court of Claims so found in its decision.

However, it developed at a subsequent hearing in the District Court criminal trial that the purported abstract was not an original, that it did not bear the actual signa-

tures of the witnesses, but only a rubber stamp facsimile, and that the witnesses had no personal knowledge as to where the original (if any) was, nor could they recall whether the document had been prepared under their direction.

If these facts had been known to the Court of Claims at the time of the hearing, the testimony of these three Government witnesses would have been inadmissible in its entirety and there would have been no basis for that Court's finding of fraud.

Petitioner brought this matter to the attention of the Court of Claims by motion under Rule 54 (b) of said Court (which is almost identical with Rule 60 (b) of the Federal Rules of Civil Procedure), but the motion was denied without a hearing. Subsequently, an independent action was brought in the same court, pursuant to the provisions of the same rule, which action was dismissed without a hearing on December 4, 1957. Petitioner's motion for rehearing was denied on March 5, 1958 and this Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT.

This petition involves a vital and novel question of the construction and application of Rule 54 (b) of the Court of Claims, which, being substantially identical to and copied from Rule 60 (b) of the Federal Rules of Civil Procedure, will necessarily affect the construction and application of the latter rule applicable to the federal courts at large. Moreover, the procedural question involved goes to the heart of the administration of justice in that it controls the rights of affected parties to seek action in the nature of a bill of review or coram nobis to review judgments secured by fraud or falsity. Should this petition not be granted those rights would be seriously and substantially impaired.

This petition involves Rule 54 (b) of the Court of Claims, *supra*, pp. 2-3, which is patterned after Rule 60 (b) of the Federal Rules of Civil Procedure, and is, in fact, a verbatim copy of that Rule in its most relevant aspects. A discussion of Rule 60 (b) is, therefore, both appropriate and necessary.

This Court's Advisory Committee on Amendments to Rules, discussing 60 (b) stated in a committee report of 1946:

> "The Committee has endeavored to ascertain all the remedies and types of relief heretofore available by *coram nobis, coram vobis, audits querela,* bill of review, or bill in the nature of review . . . it endeavored then to amend the rules to permit either, by motion or by independent action, the granting of various kinds of relief from judgment which were permitted in the Federal courts prior to the adoption of these rules, and the amendment concludes with a provision abolishing the use of bills of review and the other common law writs referred to, and requiring the practice to be by motion or by independent action."

The Government's position, briefly stated, is that petitioner, having made a motion in the Court of Claims for relief from the judgment of forfeiture, is barred from bringing this independent action. But such is not the purpose nor the effect of 60 (b), F. R. C. P., or 54 (b), Court of Claims Rules.

In Moore's *Federal Practice* (Second ed.), §60.38 [3], it is stated:

> "There are, undoubtedly, some procedural differences between the 60 (b) motion and the independent action. But the essential difference does not lie in pure procedure. It is this. The independent action affords a plain, adequate and complete remedy; and, what is perhaps more important, it affords relief, when warranted by established equitable principles, although relief by motion under 60 (b) is not obtainable because the time for making motion has run."

The procedural differences which Moore has in mind are:

(1) An independent action requires findings of fact and conclusions of law while a motion does not.

(2) A counterclaim may be asserted to an independent action, but not to a motion.

(3) Leave of the appellate court is required in making a motion under 60 (b) during the pendency of an appeal. An independent action may be maintained without such leave of court. See Moore's *Federal Practice* (Second ed.), §60.38 [3] note 15.

The requirement that findings of fact and conclusions of law be set forth in all independent actions presupposes a full and complete hearing of the issues. To deny such hearing to either party is error. In *Hadden* v. *Rumsey Products*, 196 F. 2d., 92, 96 (C.A. 2, 1952), where an action was brought to enjoin the enforcement of a judgment entered by an Ohio State Court, the court said:

> "As already stated, that court has jurisdiction to entertain an independent action to relieve a party from a judgment. The Appellee's allegations of duress, fraudulent misrepresentation and concealment, if substantiated upon a trial, may entitle them to a decree. *Without taking proof on these charges, the court entered the judgment appealed from. This was error*" (Emphasis supplied).

Because of the almost identical wording of both Federal Rule 60 (b) and Rule 54 (b) of the Court of Claims, the foregoing reasoning is equally applicable to both.

Petitioner did make a motion under 54 (b) in the original Court of Claims case but said motion was denied without hearing. Petitioner did not merely re-assert a position previously taken and disposed of by the Court of Claims, but sought, in an independent action, to establish by good and sufficient evidence the fact that fraud was in fact prac-

ticed upon the court. Petitioner sought by this independent action, to have the court enter findings of fact and conclusions of law upon the evidence presented so that a matter of such vital significance to petitioner may have been properly determined after due and deliberate consideration of all of the facts involved.

The finding of fraud and the judgment of forfeiture were based upon the original testimony in the Court of Claims of the three persons who handled the transaction for the Army Quartermaster Corps. They testified that they had no independent recollection as to whether or not a covering letter was submitted with petitioner's bid, but testified from an abstract of the bid which they said bore their signatures. Their past recollection recorded by the abstract showed that there was no covering letter submitted with the bid. They further testified that had there been a covering letter it would have shown in the abstract.

For the first time, in the trial of a criminal case, all of the foregoing witnesses, on cross-examination, admitted that the exhibit, which purported to be the abstract, did not in fact bear their signatures, that they did not know that the document was the abstract and that their prior testimony, which was based on the assumption that the exhibit was the valid abstract, was in error.

Thus, petitioner's claim for damages in a very substantial sum by reason of breach of contract (which the Army itself at one time admitted was the valid basis of a claim) was swept aside by the false testimony of the three persons who handled the transaction for the Government. Without this testimony there would have been absolutely no evidence that the covering letter had not been sent. The testimony of Mr. Kamen, President of petitioner, upon which its claim largely turned, was disbelieved, thrown out and disregarded by the court because it was assumed that he had falsely testified that he had sent the covering letter with the bid. Without the testimony concerning the abstract, which was

false, (whether intentionally or not does not matter) the Government's burden of proof as to the issue of fraud would have totally failed, and there would not have been one scintilla of evidence of a fraudulent claim or practice. Thus, a bona fide claim was thrown out of court and its owner deprived of its day in court by reason of false testimony and a rank injustice was perpetrated.

The argument that a mere motion to set aside the judgment of forfeiture without a witness having been heard, without an opportunity for the court to examine whether or not fraud had in fact been practiced constitutes a judicial determination of all the issues involved is out of keeping with our concepts. Under its equitable powers the court below must be given (or give itself) the opportunity of evaluating its prior findings in view of the testimony which would be produced at a hearing regarding the exhibit which was thought to be the original abstract. The court would then, in light of the new testimony and new facts developed by further examination of witnesses, be in a position to determine whether, in equity and good conscience, the Government should be allowed the benefit of the judgment of forfeiture.

Petitioner maintains that a mere routine denial of a motion, without a hearing, without the evaluation of equitable grounds and considerations, does violence to the statutory jurisdiction conferred upon the court to determine equitable matters in a separate action.

The language of this Court in the case of *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, 124-125, 100 L. ed. 1003, 1009-1010 (1056) is particularly appropriate. In that case the Communist Party appealed to the Court of Appeals for the District of Columbia, from a decision of the Subversive Activities Control Board, finding that the party was a "Communist-action" organization. During the pendency of the appeal the appellant filed a petition in the Court of Appeals for leave to adduce addi-

tional evidence. The basis of the motion was that the additional evidence became available subsequent to the Board hearings and that it would show that the testimony of three witnesses upon whom the Attorney General relied gave false testimony. The Court of Appeals denied the motion and affirmed the judgment of the Board. Certiorari was granted by this Court which, in its decision on the merits, stated:

> "* * * The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See *McNabb* v. *United States*, 318 U. S. 332, 87 L. ed 819, 63 S. Ct. 608. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.
>
> "*When uncontested challenge is made that a finding of subversive design by petitioner was in part the product of three perjurious witnesses, it does not remove the taint for a reviewing court to find that there is ample innocent testimony to support the Board's findings.* If these witnesses in fact committed perjury in testifying in other cases on subject matter substantially like that of their testimony in the present proceedings, their testimony in this proceeding is inevitably discredited and the Board's determination must duly take this fact into account. We cannot pass upon a record containing such challenged testimony. We find it necessary to dispose of the case on the grounds we do, not in order to avoid a constitutional adjudication but because the fair administration of justice requires it. * * *" (Emphasis supplied.)

Subsequently, in *Mesarosh* v. *United States*, 352 U.S. 1, 1 L. ed. 2d 1 (1956) and *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233, 2 L. ed. 2d. 234 (1957) this Court reaffirmed the foregoing concepts enunciated in the Communist Party case.

CONCLUSION

The questions presented are patently novel and of substantial importance both in the construction and application of Rules 54 (b) of the Court of Claims and 60 (b), F.R.C.P., and in establishing the scope of an aggrieved person's right to seek review of a judgment obtained by fraud or falsity. Petitioner submits that the action of the Court of Claims in dismissing its independent action was plainly erroneous. Accordingly, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 533-56

(Decided December 4, 1957)

KAMEN SOAP PRODUCTS COMPANY, INC.

v.

THE UNITED STATES

ON DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S PETITION Per Curiam: This is an independent action to relieve the plaintiff from the judgment dismissing its claim against the United States in cause No. 49543, decided October 5, 1954, in the case of *Kamen Soap Products Company, Inc.* v. *United States*, 129 C. Cls. 619.

On December 22, 1954, plaintiff filed a motion for rehearing, which was overruled March 1, 1955.

On August 30, 1955, plaintiff filed a motion pursuant to the provisions of Rule 54 (b) of the rules of this court, to set aside its judgment and decision of October 5, 1954. This motion was thoroughly briefed by both sides. After careful consideration, the motion was overruled by this court on November 8, 1955.

On December 26, 1956, plaintiff instituted this independent action under Rule 54 (b) to be relieved from the original judgment of this court entered October 5, 1954.

The defendant moves to dismiss this petition on the ground that all matters contained therein have been previously resolved by this court and that the petition presents no grounds for invoking the provisions of Rule 54 (b).

We have carefully examined the petition, the motion and the briefs and we find no new matters that were not presented and considered by this court in connection with plaintiffs motion filed August 30, 1955, to be relieved of the orginal judgment, which motion was overruled November 8, 1955.

Since the allegations have been thoroughly considered and passed upon by this and other courts, the defendant's motion to dismiss is granted.

The petition is dismissed.

Order

These cases come before the court on motions for rehearings, amendment of judgments or new trials under Rules 53 or 54 of the Rules of this court and, on consideration thereof,

It Is Ordered this fifth day of March, 1958, that said motions be and the same are overruled as follows:

* * * * * * * * * * * * *

533-56 Kamen Soap Products Co., Inc. Plaintiff's motion.

* * * * * * * * * * * * *

By the Court
/s/ Marvis Jones
Marvin Jones,
Chief Judge

APPENDIX B

KAMEN SOAP PRODUCTS COMPANY, INC.,

v.

THE UNITED STATES.

No. 49543.

United States Court of Claims.

Oct. 5, 1954

Before JONES, Chief Judge, and LITTLETON, WHITAKER, MADDEN and LARAMORE, Judges.

JONES, Chief Judge.

On May 28, 1947, the plaintiff entered into a contract with the Quartermaster Corps of the United States Army to furnish a specified amount of powdered laundry soap. It alleges that the defendant breached the contract in failing to supply shipping instructions, thus preventing it from accelerating delivery.

The defendant filed a special plea in fraud. At the trial the evidence was limited to the issues raised by the special plea and that is the sole issue before the court at this time.

The invitation to bid was issued on May 12, 1947. The bidding was on the furnishing of 2,190,000 pounds of laundry soap. The invitation stated that sealed bids in triplicate would be received until 12 noon of May 19, 1947. It also stipulated that delivery of the soap should be in

monthly installments of 440,000 pounds each on the last day of August, September, October, and November 1947 and the remaining 430,000 pounds by December 31, 1947. The invitation itself contained this provision:

> "Contractor is requested to accelerate and increase the deliveries to any extent provided the total of such accelerated and increased deliveries does not exceed the total quantity stipulated herein."

The invitation also notified prospective bidders that the vendor would be required to comply with instructions with respect to quantities, consignees, destinations and delivery dates as set forth in Vendor's Shipping Documents (VSD's) to be supplied by the Government at a later date. It was apparent to bidders that at least 1,750,000 pounds of tallow would be necessary for the manufacture of the soap included in the invitation, tallow being the principal ingredient in the manufacture of such soap. Actually 1,850,000 pounds were used.

The ceiling price on tallow had been removed by act of Congress some months before the contract in question was executed. Almost immediately the price of tallow rose to 21¾ cents per pound, gradually increased until March 1947 when it was 26¾ cents per pound, then gradually decreased until in May it was 12¾ cents per pound. Several days prior to May 19, 1947, plaintiff decided to submit a bid of $0.139 per pound for the soap, but this figure was changed on the morning of May 19, 1947, just before the bid was submitted, at the instruction of Mr. Kamen who directed that a price of $0.119 per pound be inserted in the bid. He took this action after learning from a tallow broker that the price of tallow had dropped to 12¾ cents per pound, and that the trend in the tallow market was downward.

The bid form stated that the period for acceptance of the bid would be 60 days if no shorter period was specified by the bidder. The bid form contained a blank space to be

filled in by the bidder to show the number of days required by him for acceptance of the bid. This space was left blank in plaintiff's bid, which allowed the full period of 60 days for its acceptance. There was another blank in the bid form under the heading of "Delivery or shipment desired." In this blank plaintiff's bid read "as scheduled or better." Mr. Kamen, plaintiff's president and treasurer, personally delivered plaintiff's sealed bid in triplicate to the New York Quartermaster Purchasing Office (NYPO) on the morning of May 19, 1947, and remained there throughout the bid opening.

Plaintiff contends that it also submitted with its bid a covering letter of May 19, 1947, limiting the time for the Government's acceptance to ten days from the date the bids were opened. The question of whether or not such a letter was submitted bears upon defendant's special plea in fraud. A copy of the letter which plaintiff claims was submitted is set out in finding 14.

On May 19, 1947, all the sealed bids, including those received by mail and those personally delivered by the bidder, were opened. The bid officer then read aloud for the information of all present the pertinent data on the bid, including the time allowed for the acceptance of the bid and other delivery conditions. Where a bid was accompanied by a letter the contents of the letter also were read by the bid officer. The bid of the John T. Stanley Company was accompanied by a letter, and this letter was read.

According to the recollection of all the witnesses present at the bid opening, including Mr. Kamen, no covering or qualifying letter from plaintiff was read in connection with plaintiff's bid. Mr. Kamen, who remained throughout the proceedings, did not mention that a letter had been submitted with plaintiff's bid, nor did he make any statement or protest in connection with the contract provision as to the time within which plaintiff's bid might be accepted by the defendant. Plaintiff's bid was the lowest of the seven

received. Mr. MacIntosh, the defendant's commodity section representative, took with him the second and third copies of each bid. These were used in preparing and checking certain documents which were required before an award could be made. Among these documents was an abstract of all bids which was made by taking from the bids and entering on the abstract sheet pertinent information including the name and address of each bidder, the quantity bid upon, the delivery schedule, if different from that specified in the specifications, and the time allowed by each bidder for the acceptance of his bid.

After the abstract was prepared the information thereon was verified by the bid officer, who compared it with the original bid in his possession. The particular information set forth in the covering letter submitted with the bid of the John T. Stanley Company was abstracted along with other information. No reference to a covering letter claimed to have been submitted by plaintiff with its bid was made in either the abstract of the bid or the approval of the award.

It was necessary to obtain the approval of the Quartermaster General in Washington before the award could be approved. This was done and on May 28, nine days after the opening of the bids, Mr. MacIntosh notified Mr. Kamen by telephone that the plaintiff's bid for the entire quantity of soap was being accepted, and that a letter of award would follow.

The next day plaintiff received the letter of award dated May 28, 1947. This letter stated that the shipment would be made in accordance with the schedule specified in the invitation and that the destination of such shipments would be shown on Vendor's Shipping Documents to follow.

The price of tallaw on May 31, 1947, was 12¾ cents per pound. On June 13, 1947, it declined to 11¾ cents per pound, where it remained through the rest of June, July,

and until August 29, 1947, when it increased to 12¾ cents per pound. It gradually increased until on September 30, 1947, it had reached 19¾ cents per pound.

On May 16, 1947, plaintiff submitted to the Veterans' Administration a bid to furnish additional soap and was awarded the contract which required more than 400,000 pounds of tallow. Plaintiff thus had commitments on the two contracts which would have required a total of approximately 2,400,000 pounds of tallow. Its storage capacity in Barberton, Ohio, where the plant was located, was 500,000 pounds of tallow. Its inventory was only a little more than 300,000 pounds. Plaintiff ordered some additional shipments in May, June, and September, as set out in findings 26 and 29. It did not order any tallow during July and August 1947. Two car which Plaintiff had purchased at 18½ cents per pound were resold by it in November at 22 cents per pound. One car purchased at 19¾ cents per pound was resold in November at 25¾ cents, and two cars purchased at 19½ cents were resold by Plaintiff in November at 22½ and 23½ cents per pound.

On July 12, 1948, plaintiff submitted a claim to the General Accounting Office in which it asserted that during the period from June 2 to September 26, 1947, it had consumed 1,555,285 pounds of tallow in producing soap for the Veterans' Administration, for commercial customers and for State and Federal agencies other than the Quartermaster Corps.

In the pending action, which was filed March 13, 1950, Plaintiff asserts that the Government failed in June and July 1947, to furnish shipping documents, to provide information needed for marking shipping containers and to supply inspection service, and that as a result plaintiff was compelled to defer delivery of the tallow ordered in May and June. Plaintiff also contends that the Government's breach of the contract forced plaintiff to seek new business and to sell soap produced from the tallow ordered for the contract at a loss.

However, in its claim of July 12, 1948, which is referred to in a previous paragraph, plaintiff did not assert that the defendant's breach of contract had compelled plaintiff to postpone delivery of the tallow purchased for the contract.

The contract involved in this suit provided that when the soap was ready for shipment plaintiff should notify the headquarters of the Quartermaster Inspection Service in New York City. On July 8, 1947, the defendant's area supervisor addressed a letter to plaintiff at Barberton stating that he planned to visit the plant on July 11, 1947, to discuss arrangements for inspecting, packing, marking and shipping the soap to be supplied under the contract. He assigned the inspection work to Peter Carr, an inspector under his jurisdiction. Mr. Carr promptly advised plaintiff of his assignment and gave the address at which he could be located, but on July 23, 1947, not having heard from plaintiff, he telephoned plaintiff's plant engineer to inquire when production of the soap for the contract would begin. He was told it would not be ready for a few days, whereupon Mr. Carr advised that he was starting on an inspection trip and left information listing the places at which he could be reached during the month. When he arrived at the Barberton plant on August 1, 1947, plaintiff's manager stated that he would soon be ready to produce soap. On August 4, 1947, plaintiff started production of soap for the contract and promptly notified Mr. Goodman, the area supervisor, that inspection services were needed. Mr. Goodman, went to plaintiff's plant in response to this message and on August 7, 1947, he notified Mr. Carr that his services were required at the Barberton plant. Mr. Carr arrived there on August 8, 1947, at which time a batch of soap of approximately 60,000 pounds had been manufactured and was ready for inspection.

It was necessary to have Vendor's Shipping Documents before plaintiff could make shipment. On several occasions during June and July representatives of plaintiff orally

requested Mr. MacIntosh to supply shipping documents, but were unable to obtain them. Mr. MacIntosh informed plaintiff that on account of the lack of storage facilities shipping documents could not be issued in advance of the dates provided in the shipping schedule. The first shipping documents were issued by the NYPO on August 8, and received at the plant on August 11, 1947; the first shipment was made the same day. Between August 5 and 9, 1947, there was some delay due to the lack of sufficient tallow at the plant. After August 28, 1947, there was no delay for lack of shipping documents. During the period August 8 to November 19, 1947, the Government issued and delivered to plaintiff VSD's covering the entire quantity of soap to be shipped under the contract. Plaintiff shipped a total of about 400,000 pounds of soap in August, September, and October 1947. No shipments were made in November and December 1947.

The sharp increase in the price of tollaw during the period August 29 to September 30, 1947, was due largely to the fact that on September 11, 1947, the Government, through the Department of Agriculture, announced export allocations of fats and oils for the fourth quarter of the year, which exceeded by 276,000,000 pounds the allocation for the same quarter of the previous year. Word of the proposed increase in exports may have reached the trade in advance of the official announcement, since a sharp upward movement started about two weeks before the announcement was made.

On September 30, 1947, Mr. Kamen wrote the contracting officer a letter which is set out in finding 41, in which he requested "your immediate consideration to delay delivery or increase the price of soap under this contract as it is working a tremendous hardship on our company." Plaintiff called attention to the fact that the Government had increased the allocation of fats and oils for export and that the price of fats and oils used in the manufacture of soap had increased to practically double the price avail-

able at the time the contract was executed. The Government was asked to modify the contract in order to relieve the hardship. The letter en route to the contracting officer passed through the hands of Mr. MacIntosh who initialed it and added the words "merits consideration."

Mr. Kamen conferred with the contracting officer early in October and again urged an increase in the contract price upon the ground that the Government's export program for fats and oils was responsible for the sharp rise in tallow prices. On October 13, 1947, the contracting officer suggested that the plaintiff submit a specific presentation of its claim, showing the actual loss to be incurred by plaintiff, accompanied by a brief statement as to why plaintiff had not covered itself with the necessary basic materials after the contract had been awarded. Plaintiff replied under date of October 31, 1947, again contending that the Government's increased export allocation of fats and oils had caused the domestic increase in the price of tallow, and gave as the reason for not having covered itself with basic raw materials that it had been the practice and policy in the industry to purchase tallow for 30 to 60 days ahead. The letter emphasized the fact that the contract made in May stated that the delivery was not to start until August, and stated that plaintiff was not able to procure its August requirements of fats and oils until July. Mr. Kamen also stated in a later letter that at the time the bid was accepted, it was impossible for either side to foresee the conditions that had developed. These letters are set out in findings 43 and 44.

On November 21, 1947, the contracting officer advised plaintiff that its contentions did not constitute excusable causes of delays within the meaning of the contract; that his office had no authority to grant an increase in the contract price on the basis set out in plaintiff's letter, and that plaintiff was obligated to make deliveries in accordance with the delivery schedule at the price set forth in the contract.

During all these communications no contention had been made by plaintiff that it had undertaken to accelerate delivery under the contract but was prevented from doing so by the Government's failure to supply the necessary shipping documents. Nor did plaintiff in any of these letters claim that its bid had been qualified by a covering letter indicating that it intended to accelerate its deliveries under the contract.

Another letter was written on December 8, 1947, requesting that plaintiff be allowed to delay the delivery of soap under the contract until the price of fats and oils receded. It repeated the assertions from the previous letters. In addition plaintiff for the first time contended that it had intended to accelerate deliveries under the contract and would have completed such deliveries prior to September 12, 1947, had it not been for the failure of the Government to supply the necessary shipping documents and inspection service. Pertinent parts of this letter are set out in finding 46. This letter was intended as an appeal from the decision of November 21, 1947. Several more letters passed between plaintiff and Col. Herbert R. Watson, who was appointed as the successor contracting officer.

On April 29, 1948, while plaintiff's appeal was pending before the War Department Board of Contract Appeals, the contracting officer wrote plaintiff stating that its right to deliver the remainder of the soap called for under the contract had been terminated under Article 5 entitled "Delays—Damages"; that the Government would purchase the undelivered quantity in accordance with the terms of the contract, and that any excess cost would be charged against plaintiff. At that time plaintiff had delivered a total of 490,589 pounds of soap, leaving 1,699,402 pounds undelivered.

On May 7, 1948, a conference was held in the office of the contracting officer, at which time it was agreed by both parties that plaintiff would continue deliveries of the undelivered portion of the contract, commencing on May

24, 1948, and would deliver at the rate of not less than 600,000 pounds of soap per month until the full quantity was delivered. It was also stipulated that plaintiff would withdraw its appeal without prejudice to its right to file a claim for damages with the General Accounting Office.

By letter dated July 13, 1948, plaintiff filed with the contracting officer a claim which was addressed to the General Accounting Office. Plaintiff claimed reimbursement of losses amounting to $261,610 which it alleged resulted from: (1) losses sustained in the disposal of tallow procured for use on the contract and sold elsewhere because of the Government's failure to accept delivery in accordance with the accelerated delivery clause of the contract, and (2) losses occasioned by the Government's demand for delivery of the soap at a later date, and by its acts which caused an increase in the price of tallow. It asserted that the losses were due to the Government's failure to furnish Vendor's Shipping Documents promptly.

The claim was transmitted by the contracting officer to the office of the Chief of Finance, Department of the Army, with the report and recommendation of the contracting officer. The report stated that in the opinion of the contracting officer the Government had breached the contract in refusing to accept accelerated deliveries, and that the contractor was entitled to provable damages therefor. It stated, however, that the memorandum of endorsement by Mr. MacIntosh indicated that he had no recollection of having had any conversations with the plaintiff regarding delivery schedules, but that Mr. MacIntosh had admitted that after the award was made the representatives of the company made telephonic and personal visits to his office requesting shipping instructions. Mr. MacIntosh's memorandum is set out in finding 51. In it he stated that no written requests were received from the plaintiff for VSD's, but that he had been telephoned regarding the issuance of VSD's and had advised that due to the lack of storage facilities, authority to comply with the acceleration

clause was denied. The memorandum stated that the contractor was advised that it must comply with the shipping schedule as outlined in the contract.

In late September the office of the Chief of Finance of the Department of the Army wrote plaintiff that its claim had been forwarded to the General Accounting Office for direct settlement. On November 17, 1948, the General Accounting Office forwarded to the Chief of Finance of the Department of the Army a letter which has been characterized by officers of the General Accounting Office as a development letter. The General Accounting Office did not make an independent investigation of the matter, but issued the letter on the basis of the information set forth in plaintiff's claim and the data transmitted by the Army. The letter is set out in finding 52. It stated that on the basis of the information submitted the contractor was entitled to whatever increased cost it was required to incur in the manufacture and delivery of the soap called for in the contract, not exceeding the reasonable value of the soap determined upon the basis of the prices prevailing for similar soap at the time deliveries were made. Later the General Accounting Office advised plaintiff that the contracting officer had been requested by it to furnish a determination as to the amount which might be allowed on plaintiff's claim pending completion of a final audit.

From November 1946 until the end of December 1949 the NYPO was under the command of Gen. L. M. Grice. The New York office was a multiple procurement office which had from 10 to 30 contracting officers under the command of General Grice. Matters involving a major question of policy were usually presented to General Grice, but it was not until December 1948 after the General Accounting Office had issued the development letter that General Grice learned of plaintiff's claim and the fact that it had been submitted to the General Accounting Office with the recommendation of Colonel Watson, the contracting officer. General Grice sent for the files, talked with some

of the personnel in the office and quickly concluded that Colonel Watson of his office had made a serious mistake in recommending the approval of plaintiff's claim.

General Grice then convened a series of meetings in his office. One of these meetings on December 10, 1948, was attended by General Grice and other personnel in his office as well as by Mr. Kamen and his attorneys. A number of questions were asked Mr. Kamen regarding his conversation with Mr. MacIntosh prior to the submission of plaintiff's bid; also concerning plaintiff's inventory of tallow; its acquistion and sale of tallow; plaintiff's other contracts and the amount of tallow required for them; plaintiff's efforts to obtain Vendor's Shipping Documents, and other pertinent subjects.

General Grice ordered Colonel Watson who was en route to a permanent station in Japan, to return. He also recalled Colonel Kuhn who had served as contracting officer on plaintiff's contract from May to December 1947, and asked him to make a written statement regarding his knowledge of plaintiff's claim. An attorney in the legal section of the New York office who had no prior connection with the claim was detailed by General Grice to assist in the investigation, and auditors were assigned to make an investigation and report on the accounting data submitted by the plaintiff. Statements were taken from the inspector, information was obtained regarding the availability of storage space at the time plaintiff's contract was entered into, and an investigation was made as to the availability of export packing containers.

On December 24, 1948, Colonel Watson, the successor contracting officer, submitted his supplemental report and recommendation on plaintiff's claim. This report was a complete reversal and repudiation of his original report of September 2, 1948. The report stated that no request for Vendor's Shipping Documents had been made of Colonel Kuhn, the contracting officer during the period involved;

that Colonel Kuhn had not delegated his authority to any person, and that neither Mr. MacIntosh nor any other employee had the authority to reject any request or make any administrative decision even if such request had been made. The report further stated that the contractor had not complained, prior to submitting its claim on December 8, 1947, that the Government had failed to supply shipping documents.

The report of the contracting officer, together with the statement and recommendation of General Grice with the endorsement of the Quartermaster General, was forwarded to the General Accounting Office on January 13, 1949. The Army also submitted other data which had been procured in the course of the investigation. The Army sent several auditors to plaintiff's office in New York and the investigation extended over a period of more than six months. Mr. Kamen made plaintiff's files fully available to them and when the audit was completed, there was submitted a determination made by the contracting officer who succeeded Colonel Watson to the effect that the plaintiff was not entitled to recover anything on its claim.

On July 12, 1949, the General Accounting Office issued a settlement certificate denying plaintiff's claim. The reasons for the denial are set out in finding 58. Among other reasons was a finding that plaintiff's letters of September 30, October 31 and November 7, 1947, demonstrated that plaintiff did not have sufficient tallow on hand to manufacture the soap covered by the contract and understood that it was not bound to complete deliveries prior to the dates set out in the contract; that the tallow which plaintiff had on hand was used for filling other orders, including a contract with the Veterans' Administration; that the plaintiff sold substantial quantities of tallow at a profit during the months of August, September, and October 1947, although plaintiff had contended that it could not obtain sufficient tallow to complete performance of the contract. Several other reasons were given. Plaintiff re-

quested reconsideration. An attorney in the General Accounting Office, Stephen P. Haycock, was charged with the duty of reviewing the evidence and preparing a decision.

As a part of the effort to secure a reversal of the General Accounting Office's decision of July 12, 1949, Mr. Kamen filed an affidavit which covered many phases of the controversy, including a detailed statement to the effect that he intended, and that he so advised Mr. MacIntosh at and after the date plaintiff received the invitation to bid, to begin the manufacture and shipment of the soap immediately after the contract was awarded and to complete all deliveries by the end of August 1947. Mr. MacIntosh submitted an affidavit dated September 28, 1949, denying many of the assertions in Mr. Kamen's affidavit and stating that while plaintiff had requested VSD's prior to August 1947, such requests appeared to be routine and were made without any indication that the contractor intended to accelerate deliveries of soap.

During a conference with one of plaintiff's attorneys on September 15, 1949, Mr. Haycock advised the attorney that the evidence available in the General Accounting Office did not indicate that plaintiff intended to accelerate delivery of soap under the contract and stated that the evidence prior to plaintiff's letter of December 8, 1947, did not show any intention to accelerate. Mr. Haycock also advised plaintiff's attorney that if plaintiff had any documents which indicated its intention to accelerate delivery such documents should be produced without delay.

On the following Tuesday, September 22, 1949, Mr. Kamen telephoned Mr. Haycock stating that his attorney had acquainted him with Mr. Haycock's comments at the conference. In the same conversation Mr. Kamen related that as a result of the call from plaintiff's attorney he had searched the files and found certain interoffice memoranda and teletype messages which passed between plaintiff's New York office and its Barberton plant. He read one of

the memoranda and inquired whether that was the type of evidence Haycock had in mind and was told that it was.

On September 22, 1949, Mr. Kamen wrote his attorneys and enclosed photostatic copies of several teletype messages to and from plaintiff's Barberton plant and also four photostatic copies of interoffice memoranda between the New York office and the Barberton plant. This letter is set out in finding 59. These documents were sent by plaintiff's attorneys to the General Accounting Office for the purpose of overcoming the objections raised to plaintiff's claim. By letter of October 1, 1949, plaintiff's attorneys transmitted to Mr. Haycock three additional interoffice memoranda between plaintiff's New York office and its Barberton plant. These were dated June 12, July 11, and July 16, 1947. The three memoranda submitted on October 1, 1949, were on tissue and each was marked "copy."

Defendant's plea of fraud is directed to the seven interoffice memoranda above referred to, and these are set out in full in findings 81 to 87, inclusive.

On November 3, 1949, the Comptroller General issued his decision on the plaintiff's request for reconsideration. The decision, which is in evidence, summarized plaintiff's claim in connection with the evidence which was made available to the General Accounting Office and stated that such evidence did not support either plaintiff's contention that it intended to make deliveries of soap at the rate of 800,000 pounds a month beginning the first of June 1947 and to complete the contract before the middle of August 1947, or its assertion that it had the ability to accelerate as represented, but on the other hand indicated that plaintiff was delinquent in deliveries after VSD's were furnished.

A few days later Mr. Kamen conferred with Mr. Haycock of the General Accounting Office and challenged a statement in the Comptroller General's decision to the effect that plaintiff was delinquent in deliveries of soap even after shipping documents had been furnished, and

asserted that he could establish the inaccuracy of the statement.

The same afternoon Mr. Kamen telephoned from the New York office to Mrs. Vesta McCanna, an employee in the Barberton office, and instructed her to make a thorough search for the bills of lading. Prior to that date he had requested the office at Barberton to send all papers pertaining to the Quartermaster contract to the New York office. Mrs. McCanna advised him that all such papers had been sent to New York in response to the previous request, but he insisted that she make a thorough search anyway. She did so and found a carton of documents, including yellow copies of the bills of lading, in a dead storage room on the third floor of the plant. Attached to these copies was also a copy of plaintiff's bid and a carbon copy of the letter of May 19, 1947. Mr. Kamen instructed that the entire carton be sent to him in New York. He then telephoned Mr. Haycock in Washington stating that he had found the bills of lading. He also read the letter to Mr. Haycock, who suggested that these documents be mailed to his General Accounting Office.

On November 26, 1949, plaintiff's attorney requested the Comptroller General to reconsider his decision primarily on the basis of the letter of May 19, 1947. This letter is set out in finding 64.

Plaintiff's attorney submitted two copies of the letter of May 19, 1947; one was a ribbon copy marked "copy" and the other was a photostat.

Plaintiff's claim that the letter of May 19, 1947, established the fact that it had sought to accelerate the deliveries of soap under the contract was also brought to the attention of officials of the Department of the Army.

Plaintiff's attorneys on November 28, 1949, wrote to the Assistant Secretary of War asserting that the NYPO had distorted the facts and had lost the letter of May 19, 1947.

The General Accounting Office requested the Quartermaster General to make a thorough search for the original of the letter dated May 19, 1947, and to make a full report as to this and several other contentions. This request was referred to the NYPO, and Harry D. Shargel, an attorney in the legal section of the NYPO, was directed to make the search. He examined all the files in the office pertinent to the contract and interviewed all the NYPO personnel whom he believed to have had occasion or opportunity to see the letter. His search failed to produce any information regarding the letter. Until the General Accounting Office letter of December 1, 1949, was handed to him, Mr. Shargel had never received any information regarding the existence of the letter which plaintiff claims was submitted with its bid. The Department of the Army submitted its report to the General Accounting Office, detailing the search covering several matters, but definitely stating that no trace of the letter had been found. A number of affidavits were attached to the report.

On February 13, 1950, the Comptroller General denied plaintiff's request for reconsideration and stated that after an exhaustive search no trace could be found of such a letter. On March 13, 1950, plaintiff filed its petition in this suit to recover $1,800,000 damages claimed to be due as the result of breaches of the contract by the defendant.

In connection with the preparation of the Government's defense, the Federal Bureau of Investigation was requested to make a complete investigation and audit including especially all facts relating to the letter of May 19, 1947, and the seven interoffice memoranda, copies of which had been submitted by plaintiff to the General Accounting Office on September 23 and October 1, 1949. The investigation was conducted primarily by Special Agents George Simpson and Thomas Hurley, at times assisted by other agents. Considerable time was spent in plaintiff's office. Mr. Kamen and his employees cooperated and allowed free access to the files and records.

Among the records made available to them was a file marked "A May 19, 1947, cover Letter." After photographing the letter, the agents returned the file to Mr. Kamen. It was subsequently established that all four copies of the letter in the file were from the same typing run. The agents later asked plaintiff to supply the carbon copy of the original letter which plaintiff claimed had been written and submitted to the New York Quartermaster office on May 19, 1947. Mr. Kamen searched his records and produced the folder which the agents had returned to him three days before. At the time the folder contained only the photostat of the letter. The agents stated that they wanted the carbon typed in 1947 rather than a photostatic copy thereof. When Mr. Kamen was unable to find the carbon in the file, they asked him to sign a statement on the reverse side of the photostat to the effect that the original of the carbon copy, from which the photostat was made, was personally delivered by him to the Army Quartermaster. At the beginning of the statement the words "I believe" were added at Mr. Kamen's request before he would sign it. The agents then requested Mr. Kamen to produce the seven interoffice memoranda which plaintiff claimed had been prepared in 1947. The investigators insisted they wanted the actual memoranda.

Later, on July 10, 1950, while the agents were in Mr. Kamen's office, he delivered to them a carbon copy of the letter of May 19, 1947. The agents told him that they desired to deal only with original evidence and pointed out that they had previously seen the ribbon copy, two carbon copies and a photostatic copy of the letter in the folder. The agents asked him if he was certain that the letter tendered by him was the true carbon copy prepared in 1947. He replied that he thought it was the true carbon copy but that he could not be positive. At the agents' request he promised to notify them later if he found the document which he decided was the true carbon prepared in 1947. On the same date, July 10, 1950, Mr. Kamen also

delivered to Agents Simpson and Hurley seven interoffice memoranda with the statement that the documents were being supplied in accordance with the request the agents had previously made on June 26, 1950. These documents consisted of a carbon copy and six ribbon copies of letters on interoffice memorandum forms.

The agents learned that the procedure in plaintiff's office in the transmission of interoffice memoranda was to send the original memorandum written on the printed form to the office receiving the message and to retain a carbon copy of the document in the office which sent the message. While this procedure was followed in general, it was found that on some occasions the carbon copy was sent to the receiving office and the original retained in the office from which the message was sent. Hence, when the seven interoffice memoranda were furnished, the agents requested Mr. Kamen to obtain and deliver to them the other half of each of said seven interoffice memoranda. These were later furnished.

On August 29, 1950, upon receiving a message that Mr. Kamen desired to see him on an important matter, Mr. Simpson called at plaintiff's office and was told by Mr. Kamen that while he was reviewing a legal file at his home, he had found an additional copy of the May 19, 1947, letter, and that he had concluded that this document was the true carbon copy of the letter, because it was attached to another letter that had been mailed to him by his attorney. Part of the sheet upon which the letter appeared had been torn off at the top and bottom. Mr. Kamen explained that the letter was in a torn condition when he received it from the Barberton office. He stated that to the best of his knowledge this letter was the duplicate carbon copy of the original which was submitted. He explained that this letter was filed away by the Barberton office staff after the completion of the contract in August 1948 and kept there until their office girl, Miss [sic] McCanna, was requested to send to the New York office copies

of VSD's and bills of lading used in connection with this contract. He also stated that in tearing this letter from the other letters attached to it, it was torn at the upper left hand corner because of the many staples holding it together.

On November 8, 1950, Mr. Kamen delivered to the agents the ribbon copy and one of the carbon copies of the letter of May 19, 1947, which they had observed in the folder on June 22, 1950. These had been requested by the agents to make certain that they had obtained all known copies of the letter in Mr. Kamen's possession. The originals and carbon copies of the memoranda and the five copies of the cover letter were the only copies of such documents that were found by the agents during the investigation.

All these documents were submitted to the laboratory of the FBI in Washington, D. C. The agents also took typing samples made on all the typewriters in plaintiff's New York office. Before the samples were taken it was ascertained that there had been no sale or exchange of typewriters in the New York office and no interchange of typewriters between the New York and Barberton offices during the period between May 1, 1947, and June 1950. They also made a random selection of letters and memoranda which had been prepared during the period between May 1947 and June 1950, and samples of blank forms of interoffice memoranda found in plaintiff's supply cabinet.

After reports of the investigation and laboratory analysis had been made, the Department of Justice decided that a plea of fraud should be filed on behalf of defendant in this case, but before it was filed plaintiff's then attorney of record was informed that the Government had determined that the letter of May 19, 1947, and the seven interoffice memoranda had not been prepared on the dates claimed by plaintiff and that the defendant intended to file a plea of fraud.

Thereafter plaintiff's attorney advised Government counsel that Mr. Kamen had been notified of defendant's intention to file a plea of fraud and that as a result, Mr. Kamen had delivered to his attorney a carbon copy of the letter of May 19, 1947, which Mr. Kamen believed was the true or original copy of that document. Government counsel requested that the letter be submitted to the FBI laboratory but plaintiff's attorney stated that he preferred to have the document examined by an expert selected by him. However, on August 2, 1951, plaintiff's attorney submitted to Government counsel the copy of the letter of May 19, 1947, which had been delivered to him by Mr. Kamen and identified by him, as above stated, as the true or original copy of the May 19, 1947, letter. The carbon copy of the letter was sent to the FBI laboratory where an examination disclosed that it was a carbon copy of the ribbon copy which the FBI agents observed in plaintiff's files on June 22, 1950; that it was a part of the same typing run as the two carbons they saw in the file on the same date.

The uncontradicted evidence shows that the three carbon copies of the cover letter obtained by Agents Simpson and Hurley were part of the same typing run and were made from the ribbon copy they had observed in the folder on June 22, 1950; that the carbon copies were made on Flywate onionskin, which was neither purchased nor used by plaintiff prior to August 1949; that the ribbon copy from which these carbon copies were made was prepared on a typewriter in plaintiff's New York office in 1949, and that the photostatic copy of the letter delivered to Agents Simpson and Hurley, as well as the photostatic copy submitted to the General Accounting Office on November 26, 1949, are both photostats of defendant's exhibit 1, which Mr. Kamen and his attorney presented to Government counsel on August 2, 1951.

These copies are all on file as exhibits in this case. Defendant's exhibit 61 is the torn copy of the letter of May 19, 1947. Mrs. McCanna did not identify this exhibit as the

copy of the letter which she had found attached to plaintiff's bid, but in his letter of September 1, 1950, Mr. Kamen stated that defendant's exhibit 61 appeared to be the copy of the letter found by Mrs. McCanna. The letter is torn at the top and bottom to the extent that only a fragment of the watermark remains. As explained in finding 77 a laboratory examination, including an enlarged photograph, shows that the typewriter key which types the letter "t" in the word "Quartermaster" on the first page of the letter, and the letter "t" on the second page in the word "not" was damaged. A comparison with other interoffice memoranda shows that the damaged "t" first appeared in such memoranda on September 7, 1949. This indicates that defendant's exhibit 61 was prepared after the middle of the year 1949. However, the expert who made this comparison was able, in connection with his examination of other questioned documents, to point out numerous characteristics in the typing as a basis for his conclusions, and we find that it has not been established by a clear and satisfactory preponderance of the evidence as to when this particular copy of the letter was prepared.

The evidence of record shows clearly and convincingly that plaintiff did not submit the letter of May 19, 1947, to the NYPO with its bid. With the exception of Colonel Watson, who did not testify, the defendant produced as witnesses the officers and employees of the NYPO who, in the normal course of their duties, should have seen the letter if it existed. None of these had ever seen or heard of such a letter prior to March 1949, although more than one thorough search was made. Although Miss Weissman of the plaintiff company made an affidavit on November 17, 1949, reciting that the questioned letter had been dictated to her by Mr. Kamen, signed by him and submitted with the bid, she signed a written statement at the request of Special Agent Simpson on August 20, 1951, to the effect that her affidavit was based on the fact that her initials were typed on the lower left hand corner of a copy

of a letter that was shown to her at the time and that she could not recall whether she had typed the letter. She testified on the witness stand that she could not recall whether the letter had been dictated by Mr. Kamen and typed by her.

Title 28 United States Code § 2514 reads as follows:

> "A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.
>
> "In such cases the Court of Claims shall specifically find such fraud or attempt and render judgment of forfeiture."

[1] It will be noted that this statute goes further than merely banning fraudulent claims. It provides for a forfeiture of the claim if any fraud is practiced or attempted to be practiced in proving, establishing or allowing a claim. This is one of the conditions on which the Government gives its consent to be sued and waives its otherwise sovereign immunity.

The undisputed evidence shows that the originals of the seven interoffice memoranda were prepared on a type of interoffice memorandum form which was first purchased by the plaintiff in May 1949; that the printed interoffice memorandum forms used in plaintiff's New York office and the Barberton plant in 1947 were of a different printing from the printing on the questioned memoranda; that the carbon copies of the furnished memoranda are on Flywate onionskin, a type of paper which was not purchased or used by plaintiff prior to 1949. Two of the memoranda were purportedly sent from Barberton, Ohio, to the plaintiff's New York office in 1947, but the undisputed evidence shows that these memoranda were written on forms which were not used in the Barberton office in 1947, but were in fact written on forms which were purchased and used in

the New York office in 1949; that the carbon copies of the two memoranda were prepared on a type of paper which was not purchased or used by plaintiff prior to 1949, and that the two memoranda were prepared on a typewriter in plaintiff's New York office.

When faced with this evidence plaintiff did not deny that the copies furnished by it and in evidence as defendant's exhibits 47 to 60, inclusive, were prepared in 1949. In his testimony Mr. Kamen denied that he had represented that the questioned documents were the true documents prepared in 1947, but said that if he made such representations he meant only that the contents of the questioned memoranda were the same as those of the true documents.

[2] We are face to face with the question of whether *fraud was practiced in the presentation of this claim.* Ordinarily fraud can only be established from circumstances.[1] These, however, must be clear and convincing. About the only way a just conclusion can be reached is by placing the questioned documents and statements alongside well-known and established facts. Every event in the universe is linked to every other event. One cause produces an effect, and that effect in turn becomes a cause; thus all events from the beginning of time are woven into one complete pattern.

It is difficult, therefore, to make up a story that is not a part of this one continuous design. It is like a patch on a suit of clothes—it may be made out of the same cloth, may look the same in the middle, but will show around the edges, because it is not a part of the original garment. Likewise a made-up story will not fit into the scheme of events, because it is not a part of it. It will not, therefore, stand close examination. One made-up story calls for

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[1] New York Market Gardners' Ass'n v. United States, 43 Ct. Cl. 114; Standard Oil Company of Kansas v. United States, 47 F. Supp. 120, 98 Ct. Cl. 201.

another and the last fabrication will not tally with the next fact.

Alhough plaintiff's claim had been pending for almost two years, and although numerous conferences were held, letters submitted, and supporting documents filed, there is nothing to indicate that plaintiff had ever referred to any of the questioned documents until after the General Accounting Office had advised plaintiff's attorney on Septemper 15, 1948, that none of the documents which plaintiff had previously submitted demonstrated plaintiff's intention to accelerate deliveries under the contract. Within five days after this advice was received, Mr. Kamen telephoned the General Accounting Office that he had located certain interoffice memoranda and teletype messages that had passed between the New York office and the Barberton plant in 1947. In his letter of September 22, 1949, he made the unqualified statement that he was transmitting photostatic copies of four of the memoranda of 1947 that he had located in his files. It is not the custom of businessmen of experience to make photostats of copies of documents, especially when the original documents themselves are available. That such was not plaintiff's practice is, we think, demonstrated by the fact that the second batch of interoffice memoranda transmitted to the General Accounting Office on September 23, 1949, consisted of memoranda typed on tissue and plainly marked "Copy." The generally recognized purpose of a photostat is to provide an exact reproduction of an important or valuable document in lieu of submitting the document itself.

After it had been established beyond any question that both the originals and the carbon copies of the seven interoffice memoranda, which Mr. Kamen supplied to the Federal Bureau of Investigation agents, were prepared in 1949, plaintiff offered no evidence in explanation of its inability to produce any one of these 14 documents which it says were prepared in 1947.

It is true that original documents are sometimes lost, but if we undertake to accept plaintiff's claim that copies were made in 1949 of documents that were prepared and sent in 1947, then we must also find that when the need of such proof was made known by the General Accounting Office, Mr. Kamen was able to locate in his files seven original and seven carbon copies of memoranda that were exchanged between the New York office and the plant in 1947; that having located these documents in September 1949, plaintiff made both ribbon and carbon copies of them on forms similar to but not the same as forms used in 1947; that contrary to the custom normally followed by businessmen, plaintiff then made photostats, not of the original documents, but of the 1949 copies, and sent such photostats to the General Accounting Office; that after the copies were made plaintiff retained seven of them in its New York office and sent seven to Barberton two years after the original documents were purportedly written, and that in 1950 plaintiff had Barberton return the copies sent to it in 1949 after the FBI agents had requested the opposite numbers of the memoranda obtained in plaintiff's New York office.

Under the circumstances which we have described, we find it altogether strange that if plaintiff located and had copies made of the true documents, it was unable to produce a witness who prepared or saw any of the 1947 documents, or who made any of the copies which the evidence shows without dispute to have been prepared in 1949.

In our findings we have pointed out a number of other circumstances from which we must conclude that the questioned documents are inconsistent with and contrary to the established facts. We specifically mention only one more here. The memorandum of May 13, 1947, was purportedly sent by Mr. Kamen from his New York office to the Barberton plant regarding the bid on the contract involved in this suit. However, the unchallenged evidence shows that on the morning of May 13, 1947, Mr. Kamen was in

he Barberton plant and at that time received a teletype nessage from the New York office stating that the bid on he Quartermaster contract had been received and that the oap would have to comply with certain specifications. Of ourse, Mr. Kamen could not write from his New York ffice to the Barberton plant at the same time he was in Barberton, and the only explanation that plaintiff makes s that the teletype message could have been received by Ir. Kamen in Barberton during the morning of May 13 nd that he could have flown to New York and written the uestioned memorandum to Barberton on the same date. lowever, it seems highly improbable to us that after Mr. Kamen had received the teletype regarding the bid opening n this contract, he would forego the opportunity to discuss he matter at firsthand with the manager while in Barberon and would return the same day to write a letter on ubject matter which he could have discussed in more etail and with greater convenience while he was in the lant itself. Thus in weaving a story the skein becomes ngled with established facts and the strands do not fit.

[3] It is not a pleasant thing to make a finding of fraud, ut the priceless ingredient in the alchemy of American usiness operations is the integrity of the maker of a roduct. or of the one who furnishes the materials and ervices. Only by faith in such integrity can the vast conomic system of our country be maintained. We reluctantly find that fraud was practiced in the presentation f this claim. The defendant's special plea of fraud is ustained, and the claim is forfeited.

LARAMORE, MADDEN, WHITAKER, and LITTLETON, Judges, oncur.

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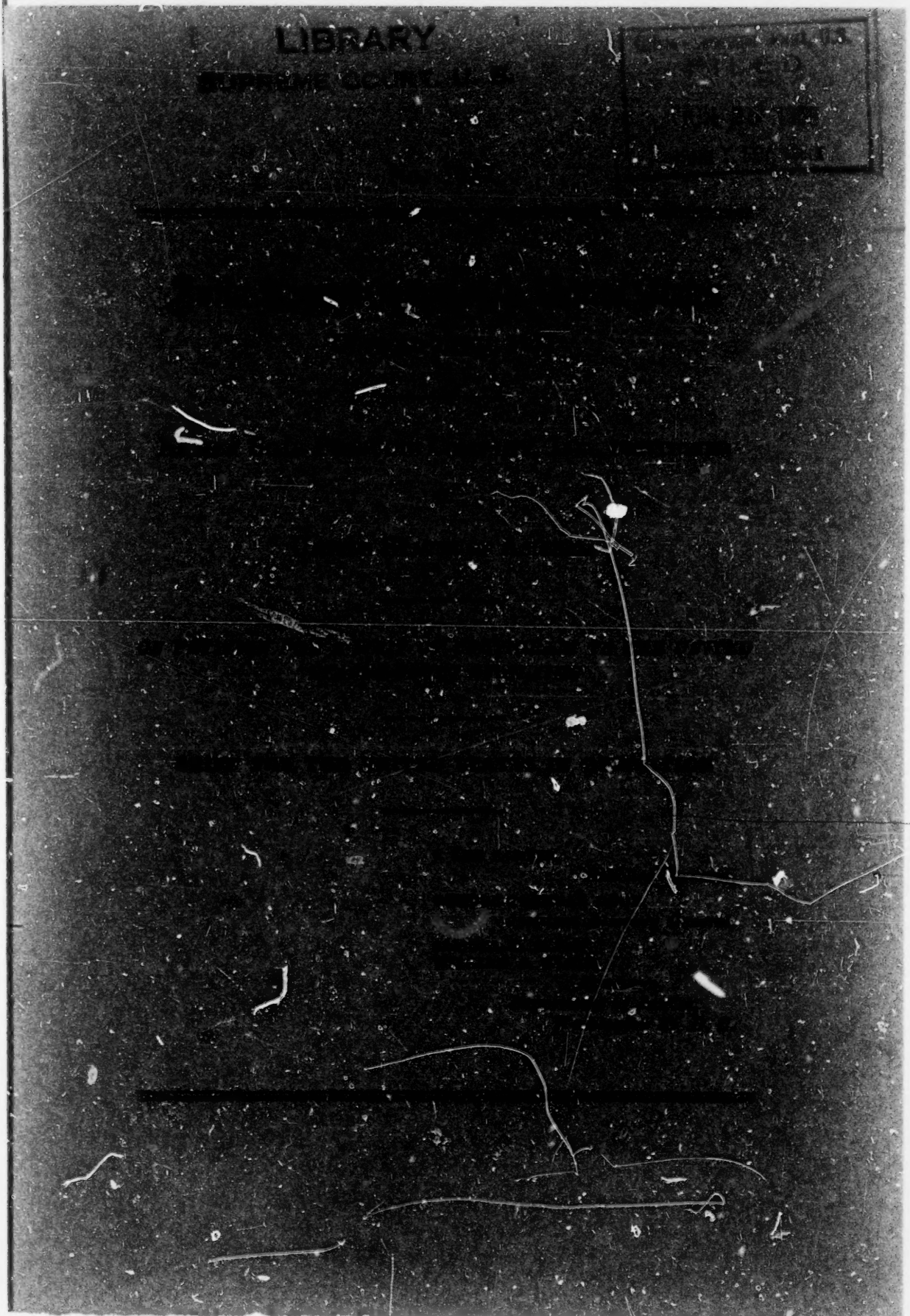

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Rules of the United States Court of Claims:	
Rule 54(b)	2, 3, 6, 7, 8, 10, 11

Miscellaneous:

7 Moore, *Federal Practice* (2d ed.):	
¶ 60.19	12
¶ 60.31	10
¶ 60.37	10

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 1037

KAMEN SOAP PRODUCTS COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the United States Court of Claims (Pet. App. 1a-2a), dismissing petitioner's independent action for relief from that court's decision of October 5, 1954, is not yet reported. The opinion in the original action, decided October 5, 1954 (Pet. App. 3a-29a), is reported at 129 C. Cls. 619, 124 F. Supp. 608.

JURISDICTION

The judgment of the Court of Claims was entered on December 4, 1957. A petition for rehearing, timely filed, was denied on March 5, 1958. The petition for a writ of certiorari was filed on May 29, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether, in the circumstances of this case, the Court of Claims abused its discretion by relying—in dismissing petitioner's independent action to set aside a prior adverse judgment on its claim against the United States—on the fact that a prior motion by petitioner had requested the same relief on the same grounds and had been denied by the court after thorough consideration.

RULE INVOLVED

Rule 54(b) of the United States Court of Claims,[1] provides:

> Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.: On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 53 (c); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospec-

[1] The Rules of the Court of Claims were promulgated by that court on the authority of 28 U.S.C. 2071. Rule 54(b) is essentially identical to Rule 60(b) of the Federal Rules of Civil Procedure, promulgated by this Court on the authority of 28 U.S.C. 2072.

tive application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of the Court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the Court. The relief provided by this rule shall be in addition to the relief available to the United States under Rule 53(a)(2).

STATEMENT

This action in the Court of Claims was brought by petitioner, under that court's Rule 54(b), *supra*, to set aside a judgment entered in a prior breach-of-contract suit in which the court had sustained the Government's special plea of fraud in the presentation of petitioner's claim and directed that the claim be forfeited in accordance with 28 U.S.C. 2514 (Pet. App. 1a, 3a, 29a). Petitioner alleged that the forfeiture judgment had been obtained by the use of false testimony of certain witnesses for the United States (R. 10). The Government's motion to dismiss was granted by the Court of Claims on the ground that the present action presented contentions which had been "thoroughly considered and passed upon" in connection with a prior motion by petitioner, filed under the same Rule 54(b) (Pet. App. 1a-2a).

The factual background of appellant's breach-of-contract claim is set forth in detail in the Court of

Claims report of the forfeiture judgment here in controversy.[2]

In brief, the following transpired: On May 28, 1947, petitioner was awarded a contract with the Army Quartermaster Corps to furnish a specified amount of powdered laundry soap (Pet. App. 3a). Subsequent to performance, petitioner sought an increase in the contract price of the soap on grounds of hardship and on the theory that Government market policies had resulted in increased costs of production (Pet. App. 9a-10a). After this relief was denied, petitioner contended that it had suffered losses by reason of the fact that the failure of Army officials to supply shipping documents had resulted in delays in production (Pet. App. 10a-12a). Petitioner's administrative claim on this ground was denied on the theory that the Army's failure to supply the shipping documents had not delayed production since at the time of the request for such documents petitioner neither intended to nor was capable of producing the soap (Pet. App. 15a). In an effort to obtain an administrative reversal of this denial of relief, petitioner supported its contention that it had intended to produce and deliver at the time of its request for shipping documents by submitting what purported to be a carbon copy of a letter, dated May 19, 1947, which allegedly had been submitted with its bid, as well as copies of various of its interoffice memoranda alleged to have been written in 1947 (Pet. App. 16a-18a). Petitioner's request for relief was denied finally on February 13, 1950 (Pet. App. 19a).

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[2] The opinion of the Court of Claims is set forth in petitioner's appendix. The court's detailed findings of fact may be found in the Court of Claims report. 129 C.Cls. 619, 645-714.

On March 13, 1950, petitioner filed suit in the Court of Claims, seeking damages for alleged breach of contract (Pet. App. 19a). The United States responded, filing a special plea in fraud pursuant to 28 U.S.C. 2514 (Pet. App. 25a).[3] This plea was based, in substance, upon the Government's contention that the carbon copy of the covering letter, and the inter-office memoranda, were manufactured evidence (Pet. App. 19a-25a). The original of the letter could not be found and Government witnesses testified that no covering letter was received when petitioner submitted its bid (Pet. App. 19a, 24a). Experts from the Federal Bureau of Investigation established, on the basis of their investigation and laboratory analysis, that the letter and memoranda submitted were not prepared in 1947, but at a later time (Pet. App. 19a-26a).

On October 5, 1954, the Court of Claims, after an extensive trial, concluded in a unanimous decision that no covering letter had been sent with petitioner's bid in 1947, and that the inter-office memoranda were prepared in 1949 rather than 1947 (Pet. App. 24a-25a). The Government's special plea in fraud was sustained, and petitioner's claim ordered forfeited (Pet. App. 29a). Petitioner's motion for a rehearing was denied on March 1, 1955 (Pet. App. 1a). 130 C. Cls. 818.

Prior to the decision of the Court of Claims on October 5, 1954, petitioner's president, A. L. Kamen, was

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[3] This statute provides:

> A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.
>
> In such cases the Court of Claims shall specifically find such fraud or attempt and render judgment of forfeiture.

indicted in the United States District Court for the District of Columbia pursuant to 18 U.S.C. 1001, on the ground that he had falsely and fraudulently represented to the Department of Justice that he had transmitted with his bid the cover letter of May 19, 1947 (R. 8). The case came to trial on April 18, 1955 (R. 8). Several of the persons who had testified for the United States in the Court of Claims proceedings again gave evidence for the Government. These witnesses had testified in the Court of Claims as to their past recollection recorded, which was represented by an abstract or summary of bids and which showed that no covering letter dated May 19, 1947, had been submitted by petitioner with its bid (R. 5-7). This testimony was repeated at the criminal trial and there, for the first time, petitioner challenged the document on which it was based. (R. 8-9). It was urged that the abstract used by the witnesses was not an original document, that a signature of one of the witnesses was merely a stamped impression, and that it had not been shown that the abstract was a record kept in the ordinary course of business (R. 9). The District Court ordered a mistrial in the criminal action and the indictment was subsequently dismissed upon the Government's motion. It is this defect of proof, which petitioner brought out in the criminal action, which is the basis of its claim in the present case that the forfeiture judgment in favor of the United States was based on false testimony and therefore must be set aside (R. 10).

On August 30, 1955, petitioner filed a motion in the Court of Claims pursuant to Rule 54(b) of that court, *supra*, requesting relief from the judgment of October 5, 1954, on the ground that it was based on the court's finding that no cover letter accompanied the May 19,

1947, bid, and that this finding was based on evidence subsequently discredited in the criminal action (R. 16). A transcript of the criminal proceedings was filed in support of this motion.

The Government responded in the Court of Claims urging denial of the motion on the ground that the Government's plea in fraud, and the ensuing decision of the court, were based primarily on matters which were not involved in the criminal proceedings, *i.e.* the seven inter-office memoranda (R. 13-17). The Government's brief also contained an analysis of the disputed evidence, demonstrating that the difficulties encountered by Government counsel in the criminal proceedings formed no basis for the charge that the Court of Claims' findings and decision were based on false or incompetent evidence (R. 17-21). Petitioner's motion for relief from the prior judgment under Rule 54(b), was overruled by the Court of Claims on November 8, 1955 (Pet. App. 1a). 133 C. Cls. 966.

On December 26, 1956, petitioner filed the present independent action in the Court of Claims, pursuant to Rule 54(b) of that court, *supra*, asking to be relieved from the court's October 5, 1954 judgment, on the grounds asserted in its earlier Rule 54(b) motion (R. 1-12).[4] The court dismissed the action on the ground

[4] In the meantime, petitioner sought relief in the United States District Court for the District of Columbia. A complaint was filed on April 21, 1956, against the Secretary of Defense, seeking to set aside the judgment of the Court of Claims and asserting the same grounds for relief as those asserted in the Rule 54(b) motion and in the present action. The Government's motion to dismiss was granted by the District Court on November 6, 1956. Its judgment was affirmed by the United States Court of Appeals for the District of Columbia in a *per curiam* decision dated June 5, 1958 (No. 13,707), on the ground that it was appropriate to "leav[e] the decision of the issues to the Court of Claims."

that the matter had been "thoroughly considered and passed upon" in connection with the earlier motion (Pet. App. 2a).

ARGUMENT

In deciding that petitioner had been guilty of fraud in the presentation of its claim, the Court of Claims acted on a substantial body of convincing evidence. Subsequently, petitioner moved to set aside the forfeiture judgment entered against it on the basis of a challenge to a small part of this evidence. The challenge went more to the admissibility of the evidence than to its authenticity and was of a sort which could and should have been raised at the trial of the case. Nonetheless, the Court of Claims thoroughly considered the motion and concluded that it must be denied. Thereafter, petitioner, in the present independent action in the same court, reasserted the claim set forth in its motion and again sought to set aside the judgment which had been entered against it. Since no new considerations were presented, the Court of Claims, in denying relief, quite reasonably and properly relied upon its prior action with respect to the petitioner's motion. There is no merit to petitioner's contention that, in refusing to ignore its prior action, the court misconstrued its own rules. Equally lacking in merit is petitioner's underlying contention that it has been denied substantial justice in this case. The judgment of the court is clearly correct and presents no novel or important issue.

In considering and passing upon petitioner's motion under Rule 54(b), the Court of Claims had before it the briefs of the parties as well as the transcript of the criminal proceedings which revealed the so-called falsity of the testimony of Government witnesses. The

court was, of course, thoroughly acquainted with the underlying facts of the case, as its initial opinion amply demonstrates. Petitioner's contention, in its motion, related solely to the defectiveness of what was essentially documentary evidence. This being so, it was entirely appropriate for the court to rule on the motion on the basis of the written matter before it, without holding a trial. Petitioner argues (Pet. 9) that witnesses should have been heard, but fails even to suggest who these witnesses might have been or what light they might have shed on the issue before the court. The sole factual basis for petitioner's claim for the extraordinary relief which it sought was the defect of proof revealed in the criminal proceeding. The Government did not find it necessary to dispute this factual assertion. Instead, it relied on two arguments indicating that the defect was of no significance. The first was that the criminal indictment was based solely on the letter of May 19, 1947, whereas the forfeiture judgment of the Court of Claims was based primarily on the interoffice memoranda (see Pet. App. 25a-29a). Thus, even if the evidence of fraud in connection with the May 19 letter had been vitiated, there would have been no reason to upset the forfeiture judgment. But, secondly, the Government argued that the difficulties of proof encountered by Government counsel in the criminal proceeding did not in fact undermine the documentary evidence relating to the May 19 letter as it was used in the Court of Claims. In that court, no objection to the authenticity of the abstract of bids had been raised, even though it was quite plain that the document was not an original. Moreover, it has been suggested by the Government (R. 19) that the abstract could have been formally authenticated at the

Court of Claims trial if any challenge had been raised. Thus, there was no reason for the Court of Claims to doubt the probative force of the abstract of bids, which, together with the far more significant F.B.I. laboratory and investigative analysis, established the spuriousness of the letter. In addition to these arguments, the Court of Claims no doubt took into consideration the fact that the objection to the abstract of bids was readily apparent and thus should have been raised, if at all, at the trial of the case. See *United States* v. *Throckmorton*, 98 U.S. 61.[5] The Court of Claims was fully apprised of all these facts and theories, relevant to petitioner's motion to dismiss, before it decided that that motion should be denied.

In these circumstances, a *de novo* consideration of precisely the same issues would be an unwarranted redundancy. Yet petitioner claims that the filing of an independent action under Rule 54(b), *supra*, entitles it to such a reconsideration. Plainly, the rule itself does not create such an unprecedented right. While petitioner's contention has never before been expressly considered, Professor Moore clearly implies that the motion and the independent action provided for in the analogous Rule 60(b) of the Federal Rules of Civil Procedure are alternative remedies. See 7 Moore, *Federal Practice* (2d ed.), ¶¶ 60.31, 60.37. The purpose of the independent action is to provide a remedy where relief by way of motion is unavailable (chiefly

[5] A corollary of this proposition is the theory that a motion to set aside a judgment should not be permitted to be used as a substitute for appeal. See, *e.g.*, *Elgin Nat. Watch Co.* v. *Barrett*, 213 F. 2d 776 (C.A. 5); *Perrin* v. *Aluminum Co. of America*, 197 F. 2d 254 (C.A. 9).

because of lapse of time). Thus, where no new considerations are involved, the prosecution of a motion to set aside a judgment should be considered a complete bar to the subsequent filing of an independent action seeking the same relief.

However, assuming solely for the purpose of argument that this were not the law under Rule 60(b), it must be remembered that Rule 54(b) was promulgated by the Court of Claims pursuant to authority delegated directly to it by Congress. 28 U.S.C. 2071. The Court of Claims has chosen to follow the language of Rule 60(b) but it is free to interpret its own rules. Its interpretation of its rules is especially immune to challenge where, as here, the interpretation is reasonable, sensible, and fair.[6]

Furthermore, in the present case the Court of Claims has not gone so far as to lay down a rule that a motion and an independent action under Rule 54(b) are alternative remedies. It has merely said that in the circumstances of this case its prior action in disposing of the motion is dispositive of the issues raised by the independent action. Thus, this case does not actually present the legal issue upon which petitioner relies in seeking review by this Court.

Finally, it is well settled that the courts are vested with broad discretion with respect to the setting aside of judgments. See, *e.g.*, *Cole* v. *Fairview Development, Inc.*, 226 F. 2d 175 (C.A. 9), certiorari denied, 350 U.S. 995; *Stafford* v. *Russell*, 220 F. 2d 853 (C.A. 9); *Union Bleachery* v. *United States*, 176 F. 2d 517 (C.A. 4);

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[6] The fairness lies in balancing the interest of the losing party and the court in preventing injustices against the interest of the winning party in freedom from vexatious and repetitious litigation.

7 Moore, *Federal Practice* (2d ed.), ¶ 60.19. The facts of this case do not support a contention that the Court of Claims has abused its discretion in denying petitioner the relief which it has requested.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
WILLIAM A. KLEIN,
Attorneys.

JUNE 1958.

☆ U. S. GOVERNMENT PRINTING OFFICE 1958 470959 1878

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 1037

KAMEN SOAP PRODUCTS COMPANY, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS, DENIED 30TH DAY OF JUNE, 1958.

SAMUEL E. HIRSCH,
38 S. Dearborn Street,
Chicago, Illinois,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 1037.

KAMEN SOAP PRODUCTS COMPANY, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS, DENIED 30TH DAY OF JUNE, 1958.

The petitioner, Kamen Soap Products Company, Inc., prays that a rehearing be granted on the denial of its petition for a writ of certiorari, to review the judgment of the United States Court of Claims dismissing its petition in the nature of an independent bill of review to set aside a prior judgment of the Court of Claims obtained on false testimony.

This petition is filed under rule 58, section 2. On March 5, 1958, the Court of Claims denied petitioner's timely motion for a rehearing. Said petition for rehearing presented to the Court of Claims the affidavits of Blossom Levinson, of 2055 Rockaway Parkway, Brooklyn, N. Y., and of Harriet C. Freiman of 3017 Brighton 2nd Street, Brooklyn, N. Y., formerly employed by petitioner as a stenographer and assistant bookkeeper, respectively, defi-

nitely recollecting the inter-office communications between the New York office and Barberton, Ohio, offices of petitioner, and definitely recalling their presence in the files of the petitioner. Copies of these affidavits are attached hereto as Exhibits A and B. This testimony was not available at the trial because the affiant had left petitioner's employ and petitioner was unable to ascertain the married names of affiants until long after the trial in the Court of Claims, according to information supplied by Mr. Abe Kamen.

Since the original finding of fraud in the Court of Claims was based on two assumptions, both shown to be erroneous, namely, first, the authenticity of the so-called abstract of the bid, fully gone into on the petition for certiorari, and second, the failure to produce the original or office copy carbons of the eight inter-office communications, the Court of Claims assumed that the covering letter submitted with the bid and the seven office communications were false and fraudulent and disbelieved Abraham Kamen's testimony in total.

With the testimony of affiants and their subjection to cross-examination, both foundations for the finding of fraud will be totally swept away. Upon a retrial in the Court of Claims, the new witnesses will be subject to cross-examination and the issue of fraud based upon the false testimony of the three government witnesses to the effect that, although they had no independent recollection as to whether or not the covering letter of May 9, 1947, was in the file, will be fully tried in its true light.

The Government in its opposition to petitioner's request for relief has repeatedly asserted that the absence of proof the existence of the seven inter-office communications and the failure to locate or produce either the originals or authenticated first carbons, showed that the copies of the said inter-office communications were spurious and

did not exist. The testimony of the affiant, the bookkeeper and stenographer, will conclusively prove that such inter-office communications were bona fide, did exist and represented communications that took place about the time of the acceptance of the bid.

As above stated, the foregoing evidence of the affiants was not available due to the fact that petitioner and its president, Mr. Kamen, did not know the married name of the witnesses.

In short, the newly discovered evidence referred to in the petition for certiorari and presented to the court below clearly proves that the three Army officers and the civilian employee of the Quartermaster's Department testified to an untruth when they identified the abstract of the bid at the trial as being a true copy of said abstract and being a true copy of their *original signatures*. Instead, the copy produced both at the Court of Claims of said abstract of bid and at the criminal trial in the District Court of the District of Columbia, were not facsimile copies of original signatures of the witnesses. No proof was offered showing who, when or where the copies of the abstract admitted in evidence in the Court of Claims were made.

Thereupon the indictment in the District Court was dismissed. See Exhibit C.

There is a tremendous difference between a *facsimile* copy of a signature and a rubber-stamp copy obviously merely the writing and obviously a copy in the handwriting of another person, of the purported signatures.

The newly discovered evidence, not available at the trial, proves that the seven inter-office communications were sent and were recalled by witnesses as of the time they were made, the argument that they did not exist and that spurious copies were submitted, fails totally.

The result of the denial of the petition will cause peti-

tioner to lose its day in Court and so lose its opportunity to prove a claim against the Government for breach of contract, involving hundreds of thousands of dollars and will result in the economic ruin of the petitioner.

We firmly believe that the situation demands a new trial clearly upon grounds falling within both the common law and statutory intent of the law governing relief upon newly discovered evidence not available at the time of trial.

We also earnestly feel that the novel question of law involving the vital question of the application of Rule 54(b) of the Court of Claims, substantially identical to Rule 60(b) of the Federal Rules of Civil Procedure, should be passed upon by this Court in the interest of public law and as an administrative guide to the lower federal courts.

Rule 54(b) of the Court of Claims as well as the common law rule evolved, concerning the writ of error *coram nobis*, clearly provide that a party seeking a new trial due to the discovery of evidence after the judgment and after term time, may both present a motion for a new trial and if not successful, subsequently thereto, file a petition in equity in an independent suit seeking to enjoin the enforcement of the judgment and seeking to set it aside upon equitable grounds.

Upon the motion, errors patent upon the face of the record could be relieved and corrected by the court without hearing. But matters involving a trial of the facts stated in the motion, such as in the case at bar, involving an issue whether the document purporting to be the abstract of the bid and purporting to bear only handwritten copies of signatures, obviously could *not* be justly determined upon the face of the motion, without the further hearing of evidence. For this reason, both the common law and the statutory law provided that an independent suit in equity in the nature of a bill for review would lie to grant equi-

table relief against the enforcement of a judgment under such circumstances.

Whether the testimony of the three Army officers and civilian employees in charge of the opening of the bid, the processing thereof and the making of the abstract, was intentionally false or inadvertently false is wholly immaterial. The point is, that a judgment forfeiting a claim against the United States, once approved administratively by the Quartermaster's Department was forfeited because of false testimony, whether intentionally false or not.

Said claim was also forfeited upon the theory that Abe Kamen, president of the petitioner, lied when he testified that he sent his covering letter and that the seven inter-office communications concerning the acceptance of the bid and the execution of the contract took place. Two new disinterested witnesses executed affidavits proving that the seven inter-office communications existed at the time of their purported date.

In conclusion, we urge that under the rules of newly discovered evidence, a rehearing of the case under Section 33 of the United States Supreme Court Section 2 should be granted and the petition of certiorari should be granted and that this Court in its supervisory powers over the lower Federal Courts should construe Rule 54 (b) of the Court of Claims identical to Rule 60 (b) F. R. C. P.

Respectfully submitted,

KAMEN SOAP PRODUCTS COMPANY, INC.,
a corporation,

By .....

Its Attorney.

I, SAMUEL E. HIRSCH, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for purposes of delay, and that the petition is restricted to substantial grounds available to petitioner although not previously presented to this Court in the original petition save and except data presented referring to Rule 54B of the Court of Claims which data counsel feels should merit reconsideration by the United States Supreme Court.

Dated July 10, 1958.

Attorney for Petitioner.

EXHIBIT A.

Subject: Contract awarded 28 May 1947 to the Kamen Soap Products Co., Inc., for 2,190,000 lbs. of Soap, Laundry, Powdered, High Titre, Quartermaster Corps Tentative Specification JCQD #27.

AFFIDAVIT.

I, BLOSSOM LEVINSON, residing at 2055 Rockaway Parkway, Brooklyn, N. Y., do certify that I was employed by Kamen Soap Products Co., Inc. from February, 1946 to November, 1950.

During this time, I was employed as a stenographer and took most of the dictation in the office and used the initials BIO on all letters dictated to me and then typed by me.

I also certify that I signed an affidavit relating to the Quartermaster among other persons in the organization, such as Max Kamen, Herbert Shapiro, Miriam Weissman and A. L. Kamen. Everyone signed their affidavit without any pressure or coercion in any way, and of their own free will. This affidavit was in reference to the efforts made by the employees and associates of Kamen Soap Products Co., Inc. to obtain shipping instructions and VSD's, during the months of June and July of 1947, from the Quartermaster, U. S. Army at 16th Street, New York City.

I also certify that in the Fall of 1949, the firm was having a very hectic time due to the matter of the Quartermaster breaching this Contract. Everyone in the office, including myself, was asked to look high and low in the very messy files for certain inter-office correspondence from Barberton to New York and New York to Barberton. These were subsequently found. I remember joining in the search therefor.

I further certify that after these letters were found, I was instructed to make many copies of same.

I particularly remember that one of the letters found contained one of Mr. Kamen's pet expressions "Clear the decks for action" and referred to getting ready to make deliveries on contract of bid of May 19, 1947.

All the above is true and correct to the best of my knowledge.

BLOSSOM LEVINSON.

Witnessed By:

S. E. HIRSCH,

EILEEN KEANE.

SUBSCRIBED AND SWORN To before me on February 11, 1957.

E. LOUISE RAUER,
Notary Public.

(SEAL)

E. LOUISE RAUER
Notary Public, State of New York
No. 31-3213500
Qualified in New York County
Term expires March 30, 1957

EXHIBIT B.

Subject: Contract awarded 28 May 1947 to the Kamen Soap Products Co., Inc., for 2,190,000 lbs. of Soap, Laundry, Powdered, High Titre, Quartermaster Corps Tentative Specification JCQD #27.

AFFIDAVIT.

I, HARRIET C. FREIMAN, residing at 3017 Brighton 2nd Street, Brooklyn, New York, certify that I was employed by Kamen Soap Products Co., Inc. from December 1943 to February 1947 and then again from April 1949 to March 1951.

During the time of my employment, I was an Assistant Bookkeeper. Miss Miriam Weissman was the Head Bookkeeper. I took instructions from Miss Weissman and Mr. A. L. Kamen.

Upon my re-employment by Kamen Soap Products Co., Inc., I recall Miss Blossom Ortsman typed many copies of interoffice letters, the originals of which were located in the files. These original letters were found by the girls who were employed at that time, among them were Miss Weissman, Miss Ortsman and myself.

Furthermore, from my long and pleasant association with you and Miss Weissman and speaking from past experience, I am of the opinion that you would never have asked Miss Weissman to sign an affidavit unless you were sure of the facts and that she in turn would not have signed an affidavit unless she was sure of the facts.

All the above is true and correct to the best of my knowledge.

HARRIET C. FREIMAN.

Witnessed By:

LOUIS COHN,

FREDERICK J. ARCARO.

SUBSCRIBED AND SWORN To before me on 12 Feb. 1957.

LOUIS B. SODSISKY,
Notary Public.

LOUIS B. SODSISKY
Notary Public, State of New York
No. 24-9099880
Qualified in Kings County
Commission Expires March 30, 1957

EXHIBIT C.

UNITED STATES DISTRICT COURT
For the District of Columbia.

United States
vs.
Abraham L. Kamen,
Defendant.
} Criminal No. 778-54.

Filed May 19, 1955.

On this 19th day of May, 1955, came the attorney of the United States, the defendant in proper person and by his attorney, requires and upon consideration of the government's oral motion for leave to dismiss, the indictment in the above entitled case, it is ordered that leave to dismiss the indictment be and the same is hereby granted.

Whereupon the United States Attorney dismisses the indictment in the above entitled case in open Court.

The defendant is discharged from further consideration in this case.

By direction of:
BOLITHA J. LAWS,
Presiding Judge,
Criminal Court # Assign.
HARRY M. HULL,
Clerk,
By JOHN H. HESS,
Deputy Clerk.

Present:
United States Attorney,

By EDWARD O. FENNELL,
Assistant U. S. Attorney,
C. MACREYNOLDS,
Official Reporter.